International Seabed Authority ISBA/24/C/8

Council

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Statement by the President of the Council on the work of the Council during the first part of the twenty-fourth session

I. Opening of the session

1. In 2017, acting on the recommendation of the Committee established by the Assembly to carry out a periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea, the Assembly endorsed the revised schedule of meetings for 2018 and 2019 (ISBA/23/A/13, sect. D, para. 1), owing to the increased workload of the Authority. Accordingly, the twenty-fourth session of the Council is being held in two parts. For the first part, the Council held 10 meetings from 5 to 9 March 2018, at the headquarters of the Authority in Kingston, immediately prior to the two-week session of the Legal and Technical Commission. The second part of the session will be held from 16 to 20 July 2018, after the meetings of the Commission and before the meetings of the Assembly.

II. Adoption of the agenda

2. At its 231st meeting, on 5 March 2018, the Council adopted the agenda for both parts of its twenty-fourth session (ISBA/24/C/1).

III. Election of the President and Vice-Presidents of the Council

3. At the same meeting, the Council elected Olav Myklebust (Norway) as President of the Council for the twenty-fourth session. Subsequently, following consultations among the regional groups, the Council elected the representatives of Côte d'Ivoire (African States), India (Asia-Pacific States), Poland (Eastern European States) and Brazil (Latin American and Caribbean States) as Vice-Presidents.

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IV. Report of the Secretary-General on the credentials of members of the Council

4. At the 234th meeting, on 8 March 2018, the Secretary-General informed the Council that formal credentials issued by the Heads of State or Government, Ministers for Foreign Affairs or persons authorized by the Ministers had been received from the following 22 members of the Council: Argentina, Australia, Bangladesh, Brazil, Chile, China, Côte d'Ivoire, France, Ghana, India, Italy, Jamaica, Japan, Mexico, Netherlands, Norway, Poland, Republic of Korea, Russian Federation, Singapore, Tonga and United Kingdom of Great Britain and Northern Ireland. Nine letters of credentials had also been submitted by facsimile or in the form of initialled notes verbales from ministries, embassies, permanent missions to the United Nations, permanent missions to the Authority and other government offices or authorities from Algeria, Cameroon, Canada, Germany, Morocco, Nigeria, Panama, South Africa and Uganda.

5. In accordance with rule 18 of the rules of procedure of the Council, credentials had been submitted by the European Union and the following 12 members of the Assembly who were not members of the Council but were entitled to participate in its meetings, pursuant to rule 74 of its rules of procedure, namely, Belgium, the Congo, Costa Rica, Egypt, Jordan, Kenya, Nauru, Portugal, Qatar, Senegal, Spain and Ukraine.

V. Election to fill a vacancy on the Legal and Technical Commission

6. At its 231st meeting, the Council elected Ahmed Farouk (Egypt) to fill the vacancy on the Legal and Technical Commission left by the resignation of Mahmoud Samy (Egypt), for the remainder of his term until 31 December 2021 (see ISBA/24/C/2).

VI. Status of contracts for exploration

7. At the same meeting, the Council took note of the total number of contracts for exploration granted by the Authority, which amounted to 28 (see ISBA/24/C/5) with the entry into force, on 12 February 2018, of the contract for exploration for polymetallic sulphides with the Government of Poland. It also took note of the scheduled signature of the contract for exploration for cobalt-rich ferromanganese crusts with the Government of the Republic of Korea on 27 March 2018 and that of the extension agreement with the Government of India on 15 March 2018.

VII. Implementation of the decision of the Council in 2017 relating to the summary report of the Chair of the Legal and Technical Commission

8. Also at the 231st meeting, the Secretary-General provided an interim update on the implementation of the decision of the Council relating to the summary report of the Chair of the Legal and Technical Commission during the twenty-third session (see ISBA/24/C/6). A separate report of the Secretary-General was presented, with a focus on a preliminary strategy to make progress on the development of regional environmental management plans under the auspices of the Authority for key provinces where exploration activities under contracts were being carried out

(see ISBA/24/C/3). Another report was also presented, which included details on issues relating to contractor compliance, in response to a request made in the Council decision of 2017 (see ISBA/24/C/4).

A. Development of regional environmental management plans for the Area

9. At the 231st meeting, the Council took note of the preliminary strategy, including the proposed programme of workshops for 2018, with the aim of developing a more coherent strategy for the development of regional environmental management plans (see ISBA/24/C/3). The Council noted that the preliminary strategy laid out a coherent and coordinated approach to the process. The Council agreed with the priority areas that had been identified on a preliminary basis as the Mid-Atlantic Ridge, the Indian Ocean triple junction ridge and nodule-bearing province, as well as the North-west Pacific and South Atlantic for seamounts. The Council supported the expansion by the secretariat of the breadth and depth of its strategic partnerships with relevant organizations and researchers, including exploring opportunities for new strategic partnerships, as the availability of data was the driver of the development of regional environmental management plans. The Council encouraged further outreach and consultation with the relevant stakeholders, including both contractors and research organizations, in order to collect and analyse the environmental data so that the Authority had sufficient scientific basis for proceeding with the development of regional environmental management plans for the priority areas identified. The Council expressed its appreciation for the initiative by the China Ocean Mineral Resources Research and Development Association to convene a workshop, jointly with the Authority, on the development of such a plan in the Pacific Ocean, to be held from 26 to 29 May 2018. The Council also noted the challenges faced by the Authority and the need for significant investment to compile available data and identification gaps. The Council requested the secretariat to explore ways to broadly disseminate the outcomes of the joint workshop and encouraged broad participation in the programme of workshops as a whole.

10. It was considered essential that plans be developed in a transparent manner under the auspices of the Authority, in the light of its jurisdiction under the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. The Council also considered the relationship between the regional environmental management plans and the draft regulations on exploitation.

B. Issues of compliance by contractors

11. At the 232nd, 234th, 235th and 236th meetings, on 5, 8 and 9 March, the Council considered a detailed analysis relating to compliance by contractors (see ISBA/24/C/4). The Council noted that that was a complex issue, which was being raised for consideration at a timely moment, when regulations on exploitation were being drafted. Several delegations commented on the necessity of striking a balance between the need for transparency and respect for confidentiality over time and in the context of the organs involved in the monitoring of compliance, such as an inspection mechanism within the secretariat, the Legal and Technical Commission, the sponsoring State(s), the Council and the Secretary-General. References were also made to the launching of the database, which would facilitate the availability of non-confidential data and information. The Council also noted the need for a more effective validation process for distinguishing non-compliance from inadequate or incomplete performance arising out of technological and site-related challenges

against an approved plan of work. The point was also made that the Authority was in a transitional phase to its new role as a future regulator of mining.

12. The Council took note of the matters relating to compliance by contractors with plans of work for exploration (see ISBA/24/C/4) and invited the Secretary-General to request contractors to provide more information on the reasons for delays in implementing plans of work and for reductions in projected expenditure.

13. The Council also took note of the respective responsibilities of the Secretary-General, the Commission and the Council in relation to the reporting of activities carried out under plans of work for exploration.

14. The Council requested the Secretary-General to report annually to the Council, identifying instances of alleged non-compliance and the regulatory action recommended or to be taken in accordance with the Convention, the Agreement and the regulations on prospecting and exploration, including any monetary penalties to be imposed by the Council, and invited the relevant sponsoring States to provide any information relating to such non-compliance and measures taken to ensure compliance under a contract for exploration, in accordance with article 139 of the Convention.

15. The Council requested the Secretary-General to include in reports on the status of all contracts greater detail on the periodic review of implementation of plans of work for exploration in accordance with the relevant provisions of the regulations on prospecting and exploration.

16. The Council also requested the Secretary-General to explore with contractors the possibility of making contracts for exploration and associated programmes of activities publicly available, taking into account the confidentiality obligations under such contracts, and to report to the Council at its twenty-fifth session.

VIII. Draft regulations on exploitation of mineral resources in the Area

17. From 6 to 9 March, the Council met in an informal setting to consider the briefing note on the submissions in relation to the draft regulations on exploitation of mineral resources in the Area (ISBA/24/C/CRP.1). The Council noted with appreciation the 55 submissions, including 18 from member States and 1 from a regional group (African States), received by the secretariat in response to the draft regulations. It also noted the questions addressed to stakeholders (see ISBA/23/C/12, annex). The Council acknowledged the contribution of the workshop on the draft regulations, hosted jointly by the United Kingdom and the Royal Society and held in London on 12 and 13 February, and the report on the outcome of that workshop.

18. During its meetings, the Council discussed six common themes arising from the responses to the draft regulations, as set out in the issue notes annexed to the briefing note. The main objective of the discussion was to provide action-oriented advice to the Legal and Technical Commission to facilitate its forthcoming deliberations on the draft regulations, to be held from 12 to 23 March 2018, on the basis of the six themes presented to the Council.

19. It was highlighted that the draft regulations must reflect the provisions of the Convention and the Agreement, including the policies relating to activities in the Area and the need to adopt the measures necessary to ensure the effective protection of the marine environment from harmful effects that might arise from such activities. In the continuing development of the draft regulations, the Council highlighted the need for a transparent and inclusive approach to the drafting of their content. Consequently,

the Commission was requested to give due consideration, in its subsequent reports, to the responses of member States and other stakeholders to the draft regulations and to outline the rationale for any amendment or modification to the draft text.

20. The Commission was requested to provide, in advance of the second part of the Council session to be held in July, a working paper on the draft regulations, in the six official languages. The working paper should include:

(a) A revised and annotated set of draft exploitation regulations;

(b) A briefing note highlighting matters requiring further investigation or study;

(c) Any matters requiring the Council's direction or guidance.

21. In the light of the deliberations by the Council on the six common themes, the Commission was requested to address, to the extent possible, the following points and actions during its forthcoming meetings.

A. Issue note 1: understanding the pathway to exploitation and beyond

22. In connection with the structure, content and flow of the draft regulations, the Commission was requested:

(a) To strengthen the principle of the common heritage of mankind in operative provisions of the draft regulations and in accordance with the Convention. The principle and its implementation for the benefit of all of humanity were to be prioritized in the development of the draft regulations, including regard paid, during the application process, to how a plan of work would contribute to the implementation of the principle;

(b) To examine the interaction and cohesion between the workflows of the exploration regulations and the draft exploitation regulations, in particular by:

(i) Identifying the necessary requirements in the exploration phase;

(ii) Assessing whether information flowing from the exploration regulations and contracts would allow for the proper development of documentation needed for an application for a plan of work for exploitation;

(iii) Re-examining the definition of "exploitation" in the draft regulations (which differs from that given in the exploration regulations);

(iv) Determining how exploration activities under an exploitation contract would be regulated;

(c) To review the relevant draft regulations reflected in attachment 2 to issue note I in annex I of the briefing note and consider any further regulatory provisions required to cover the respective exploitation process and phases;

(d) To identify any further elaboration required under guide lines or procedures to ensure that standards could evolve into good industry practices, from the commercial and environmental perspectives;

(e) To consider the concept of "best available technology", its incorporation into the draft regulations and ways to foster its adoption and development;

(f) To ensure that regulatory provisions were technologically, scientifically and environmentally viable;

(g) To consider the commercial viability of the regulatory provisions;

(h) To consider a progressive reporting and auditing mechanism that would cover the relevant stages of the exploitation contract, not only whether there has been a change of circumstances in the marine environment, while reflecting a precautionary approach;

(i) To formulate an update and review mechanism for the financing plan (annex III to the draft regulations) to ensure continued financial capability under an exploitation contract;

(j) To collaborate with the Finance Committee and make recommendations to the Council on the respective roles and responsibilities of the Commission and the Committee in order to facilitate cooperation in the development of the draft regulations, in particular the payment mechanism and, more specifically, administrative fees, and the development of equitable sharing criteria, which is on the agenda of the Committee for consideration at its meetings in July 2018. A summary report of the discussions held between the Commission and the Committee was to be provided to the Council, including a work programme for the development of the payment mechanism (including administration and other fees) and of the equitable sharing criteria;

(k) To provide the Council with a more detailed flowchart to facilitate understanding of the regulatory processes and workflows;

(l) To consider the requirement for resource-specific provisions in the draft regulations;

(m) To examine the approaches taken to the draft regulations with regard to the balance between certainty and predictability, as well as flexibility and adaptability;

(n) To discuss, together with the Secretary-General, the need to strengthen institutional resources and expertise to implement the regulations;

(o) With regard to the structure of the draft regulations and specific regulatory provisions:

(i) To re-examine the structure and flow of the parts (for example, the current part XI might be placed after part IV and the current part X after part VII);

(ii) To ensure that the appropriate balance of a contractor's rights and obligations was properly reflected in the draft regulations;

(iii) To ensure that draft regulation 7 (4) (d) was clear in relation to the health and safety of crew and third parties alike who might be directly affected by the proposed activities;

(iv) To examine the rationale and objectives for the performance guarantee (for example, the terms of closure and the content of a closure plan);

(v) To ensure that articles 142 and 147 of the Convention were properly reflected in the draft regulations;

(vi) To examine ways and means to pay reasonable regard to other activities in the marine environment, such as navigation, the laying of submarine cables and pipelines, fishing and scientific research;

(vii) To clarify the definitions of "contract area" and "mining area";

(viii) To reconsider the basis for an administrative review mechanism in the light of the existing dispute settlement mechanisms set out in the Convention;

(ix) To review all timelines and deadlines across the draft regulations, in particular the need for certainty in the consideration and assessment of a plan of work, including the necessary consultations;

(x) To clarify insurance requirements under draft regulation 27;

(xi) To elaborate on the categories of monetary penalties in appendix III to the draft regulations.

B. Issue note 2: payment mechanism

23. Discussion in the Council on the issue of a fair and equitable payment mechanism was facilitated by a presentation by the Director of the Materials Systems Laboratory of the Massachusetts Institute of Technology, Richard Roth, on the economics of seabed mining for polymetallic nodules. The Council understood that Mr. Roth would make a presentation to the Commission on 21 March 2018.

24. The Council noted the objectives and principles relating to the development of financial terms and of a system of payments under the Convention (annex III, art. 13) and the Implementation Agreement (annex, sect. 8), respectively, and requested the Commission to keep such objectives and principles under consideration as a model to evaluate the payment mechanism when it was developed.

25. In connection with the Commission's forthcoming meeting with Mr. Roth together with the secretariat, the following areas were highlighted by the Commission for further exploration and investigation, in connection with the development of the models created by the Institute to evaluate the payment mechanism for the Authority by assessing the underlying assumptions and data in the cost, price forecast and cash flow components of the model, specifically:

(a) Revenue forecasts and metal pricing, in particular assumptions for manganese pricing (relevant purity and grade);

(b) Production and downtime assumptions;

(c) Insurance assumptions and impact on risk mitigation;

(d) Constituent metals used for revenue forecasts;

(e) Data assumptions for pre-feasibility, feasibility and other costs;

(f) Environmental cost assumptions;

(g) Assumptions made for currency fluctuations;

(h) Factoring in mining efficiencies;

(i) Specific considerations for other resource categories and the flexibility of the model to reflect such considerations;

(j) Mechanisms to compensate the common heritage of mankind, which should include royalty and profit share and model different scenarios, and the principles and timing of review under the model;

(k) The principles of no artificial advantage or disadvantage, namely, how to achieve neutrality;

(l) Understanding the impact of the Authority as part of the cost structure for contractors;

(m) Supporting the Massachusetts Institute of Technology in collating data and information for the model;

(n) Incentive mechanisms, such as the use of funds, for reducing environmental impacts.

26. The Commission was also requested, in performing the functions of the Economic Planning Commission, to examine the requirements under the Convention and the Implementation Agreement with regard to protecting developing countries from adverse effects resulting from exploitation activities in the Area and to make the necessary recommendations to the Council on how to address the issue. The Commission was further requested, together with the secretariat, to initiate a study of the potential impact of mineral production from the Area, in accordance with section 1, paragraph 5 (e), of the annex to the Agreement, and to provide the Council with an update on the timing of the study during the second part of its session, in July 2018.

27. While it was noted that part VII of the draft regulations, on financial terms of an exploitation contract, was a work in progress, the Commission was requested:

(a) To clarify the meaning of "special circumstances" in draft regulation 60 (4);

(b) To reflect on a standard for the measuring and valuation equipment required for the purposes of draft regulation 65;

(c) To consider the use of other internationally accepted accounting principles under draft regulations 39 (1) and 64 (2);

(d) To re-examine the basis of the calculation of an annual fixed fee under draft regulation 49, possibly on the active mining area and taking into account abundance and grade;

(e) To examine definitions, including "commercial production", "relevant mineral", "monetary value", "financial capability", "resources" and "reserves".

28. The Commission was requested to investigate recent changes to and developments in extractive industry fiscal regimes, in order to draw upon best current practices.

29. The Commission and the Secretary-General were requested to make the arrangements necessary for continued engagement with and the receipt of deliverables from the Massachusetts Institute of Technology.

30. The Commission was also requested to explore options in respect of the payment mechanism and make recommendations to the Council on which options would best help to achieve the objectives and principles set out in the Convention and the Agreement.

C. Issue note 3: the role of the sponsoring States

31. The Commission was requested to formulate a matrix of duties and responsibilities of the Authority and the sponsoring States and to consider extending that, where practicable, to reflect the roles of the flag States and the coastal States.

32. As to the draft regulations, it was suggested that the Commission might wish to address the following points:

(a) The review of the contractor's track record prior to a change of sponsoring State;

(b) Issues relating to multiple sponsoring States;

(c) Provisions on cooperation between the Authority and the sponsoring State(s), identification of which organ of the Authority a sponsoring State was to communicate with, the form of such communication and the points of contact;

(d) The adoption and implementation of the uniform application of the rules, regulations and procedures of the Authority under article 17 (1) of annex III to the Convention, to ensure a level playing field for contractors.

33. The Commission was asked to take the following action with regard to the relevant regulatory provisions:

(a) Re-examine the rationale for a 12-month period under draft regulation 14, compared with a 6-month period under the exploration regulations;

(b) Clarify that a change of sponsoring State must respect the effective control requirements (draft regulation 14);

(c) Consider the deletion of wording in draft regulation 15 (1) reading "which is not to be unreasonably withheld or delayed", given that the decision to sponsor was a sovereign act of a State;

(d) Assess whether draft regulation 15 (4) should refer to the registration of securities and guarantees;

(e) Specify which organ of the Authority should issue consent (draft regulation 16 (1));

(f) Clarify the roles of the Authority and sponsoring State(s) in draft regulation 17;

(g) Consider the issue of international responsibility (draft regulation 91).

34. The Council supported the convening of a workshop on the roles and responsibilities of sponsoring States, flag States, coastal States and port States in monitoring and enforcement measures to clarify those issues in the draft regulations. The Council emphasized the need to hold workshops in a transparent and open manner.

D. Issue note 4: role and legal status of standards, recommendations and guidelines

35. It was noted that there was a need for the development of an appropriate mix of performance and procedure-related standards, including an inclusive and transparent process for their development, and a need to re-examine the legal status of the Commission's recommendations for the guidance of contractors under the exploitation regime.

36. The Commission was requested to consider the development of relevant guidelines under a consensus-based approach.

37. The Commission was asked to consider a mechanism under the draft regulations to strike a balance between flexibility, adaptability and stability in the regulatory framework in the review, modification and adoption of standards and guidelines.

38. The Commission was invited to formulate a suggested process, which should be inclusive and transparent, for the development of the standards and guidelines, together with an indicative list of such standards and guidelines by subject matter.

39. The Commission should consider the timing of a workshop dedicated to the development of standards and guidelines and consider the legal nature of such standards and guidelines.

E. Issue note 5: broader environmental policy and the regulations

40. The Commission was requested:

(a) To bear in mind the importance of environmental protection, recognized as a core part of the draft regulations;

(b) To ensure that a precautionary approach and the best available scientific evidence were adequately reflected in the regulations and accorded the appropriate weighting;

(c) To reflect on relevant content for an environmental policy framework and to make recommendations to the Council, taking into account the Authority's draft strategic plan;

(d) To assess comments by member States and other stakeholders in connection with the incorporation of regional environmental management plans into the draft regulations and to make recommendations to the Council;

(e) To examine and expand, as appropriate, on the provisions under part IV of the draft regulations relating to the effective protection of the marine environment, including by:

(i) Determining the requirements for the delivery of a comprehensive environmental impact assessment, including applicable standards;

(ii) Assessing the requirements for a comprehensive environmental management and monitoring plan;

(iii) Reviewing the definitions of "interested persons", "good industry practice", "best environmental practices", "independent" and "serious harm" in the draft regulations in the light of the submissions by member States and other stakeholders;

(iv) Elaborating on the general principles under draft regulation 17 and considering their operation;

(f) To consider a specific provision regulating mining discharges in accordance with applicable standards, keeping in mind the technological realities and challenges, including possible alignment with existing relevant legal instruments;

(g) To consider frequency in the reporting and review of environmental performance;

(h) To underline the importance of making data available to underpin environmental protection through informed decision-making.

F. Issue note 6: roles of the Council, the Secretary-General and the Legal and Technical Commission in implementing the regulations

41. The Commission was invited to provide clarification on the respective roles of the Council, the Secretary-General and, as appropriate, the Assembly and to consider specifying which body of the Authority was responsible when reference was made to the Authority.

42. The Commission was requested to review the balance of authority, in particular between the Council and the Secretary-General, taking into account the fact that the Council was the executive body of the Authority, the need for efficient decision-making, including possible provisional decision-making authority for the Secretary-General, and current provisions in the exploration regulations, for example.

IX. Approval of the memorandum of understanding between the Asian-African Legal Consultative Organization and the International Seabed Authority

43. At its 232nd meeting, on 5 March 2018, the Council approved the memorandum of understanding between the Asian-African Legal Consultative Organization and the International Seabed Authority, in which the scope of cooperation between the two organizations is specified (ISBA/24/C/7).